THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

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SC Court of Appeals

Case No. 2017-002347

EPS Advisors, LLC . . . . Respondent/Appellant,

vs.

Jan Fredman and Clemson-EPS Advisors, LLC . . . Appellants/Respondents.

APPELLANTS/RESPONDENTS' FINAL BRIEF TO CROSS APPEAL

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INDEX

PAGE

Discussion:

Argument A 1-4

Argument B 5-9

Argument C 9-11

Summary 11-12

Certificate of Counsel 13

Proof of Service 14

TABLE OF AUTHORITIES

Cases

PAGE

Allegro, Inc. v. Scully
409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014) 2

Anderson County v. Preston
420 S.C. 546, 804 S.E.2d 282 (Ct. App. 2107) 3

Broome v. Watts
319 S.C. 337, 461 S.E.2d 46 (Ct. App. 1995) 7, 12

Foreign Academic and Cultural Exchange Services, Inc. v. Tripon
394 S.C. 197, 715 S.E.2d 331 (Sup. Ct. 2011) 2

Futch v. McAlister Towing of Georgetown
335 S.C. 598, 518 S.E.2d 591 (Sup. Ct. 1999). 1

Hartford Elevator, Inc. v. Lauer
94 Wis.2d 571, 289 N.W.2d 280 (1980) 4

Lowndes Products, Inc. v. Brower
259 S.C. 322, 191 S.E.2d 761 (Sup.Ct. 1972) 1

Menezes v. W.L. Ross & Co., LLC
403 S.C. 522, 744 S.E.2d 178 (Sup. Ct. (2013) 2

Moore v. Moore
360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) 2

Oxford Finance Companies, Inc. v. Burgess
303 S.C. 534, 402 S.E.2d 480 (Sup. Ct. 1991) 4, 5

Pye v. Estate of Fox
369 S.C. 555, 633 S.E.2d 505 (Sup. Ct. 2006) 1

State Farm Mutual Ins. Co. v. Campbell
538 U.S. 408, 123 Sup. Ct. 1513, 155 L.Ed.2d 585 (2003) 10

Summersell v. S.C. Dept. of Public Safety
337 S.C. 19, 522 S.E.2d 144 (Sup. Ct. 1999) 2

TABLE OF AUTHORITIES

Other Authorities

PAGE

SCRCP, Rule 8(c) 7,12

SCRCP, Rule 59 . . . . 2, 9

DISCUSSION

ARGUMENT A.

The first issue presented by EPS Advisors alleges that the Court erred in failing to find that the full $105,352.50 was converted by Fredman because Fredman breached the duty of loyalty and, therefore, forfeited his right to any compensation for the first quarter of 2010. This issue fails on its face, however, because breach of loyalty was not pled as a separate cause of action nor otherwise properly raised and ruled upon in the Lower Court; therefore, it cannot now be presented for the first time on appeal. **[Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (Sup. Ct. 2006)]** Although EPS did mention breach of loyalty and cited **Futch v. McAlister Towing of Georgetown, 335 S.C. 598, 518 S.E.2d 591 (Sup. Ct. 1999)** in the Memorandum submitted at the invitation of the Trial Judge following the close of all evidence **[R.,pp.38-40]**, it was done in an attempt to bootstrap the claim to its breach of contract claim which Fredman submits it cannot do. It did not plead breach of loyalty as part of the breach of contract cause of action nor did it appeal the Trial Judge's denial of the breach of contract claim.

Breach of loyalty is a tort and is clearly a separate and distinct cause of action. South Carolina, as well as the majority of jurisdictions, clearly treats breach of loyalty as a tort and/or its own independent cause, not an action in contract or a part of a breach of contract cause of action. In asserting this position, Fredman is aware that **Lowndes Products, Inc. v. Brower, 259 S.C. 322, 191 S.E.2d 761 (Sup. Ct. 1972)** states that an agent's breach of duty to its principal is a tort, as well

as a breach of contract, which seems to imply that breach of loyalty may be maintained under a breach of contract cause, but submits that subsequent case law retreats from that implication and holds that breach of loyalty is a tort and/or a separate and distinct cause of action from breach of contract. **[Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004); Foreign Academic and Cultural Exchange Services, Inc. v. Tripon, 394 S.C. 197, 715 S.E.2d 331 (Sup. Ct. 2011)**; **Menezes v. W.L. Ross & Co., LLC, 403 S.C. 522, 744 S.E.2d 178 (Sup. Ct. 2013); Allegro, Inc. v. Scully, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014)]** It is further submitted that Fredman was an independent contractor and, as such, owed no duty of loyalty to EPS under any theory, either tort or contract.

Even assuming arguendo that breach of loyalty was properly raised at trial, the Trial Judge never addressed the breach of loyalty claim in either of his Orders and EPS never filed a post-trial motion pursuant to ***SCRCP, Rule 59,*** requesting a ruling on whether a duty of loyalty existed and, if so, whether it was breached. Neither has EPS appealed the Trial Judge's ruling on its breach of contract claim. It is, therefore, submitted that the issue is not preserved for consideration on appeal and is not now before this Court. **[Summersell v. S.C. Dept. of Public Safety, 337 S.C. 19, 522 S.E.2d 144 (Sup. Ct. 1999)]**

Notwithstanding the cause of action and/or preservation issue, it is also submitted that the Lower Court's silence upon the duty of loyalty is supported by the evidence or, rather, the lack thereof. The record clearly shows that Fredman was an independent contractor of EPS, not an employee **[R., p.118, ll.12-21; p.153, ll.2-**

25], so, by the very nature of his status, he did not owe EPS a duty of loyalty. **[Anderson County v. Preston, 420 S.C. 546, 804 S.E.2d 282 (Ct. App. 2017)]** There is also no evidence that a fiduciary duty existed or that any damages were suffered by EPS as a result of Fredman's acts and/or that Fredman's acts rose to a level which required the Court to deprive him of his right to receive his share of the fees earned, to-wit: 85%. **[R., p.138, ll.11-16; p.147, ll.20-25]** Dameron clearly testified that Fredman did not cause him to file personal bankruptcy or cause EPS to go out of business **[R., p.146, ll.9-14]**; that he knew in January 2010 that there was a possibility that Fredman might leave EPS Advisors **[R., p. 112, ll.16-21]**; and that there was not a non-compete agreement and that Fredman had a right to do what he did **[R., p.132, l.8 - p.133, l.19]**. Additionally, there was absolutely no evidence introduced concerning damages to EPS as a result of any acts of Fredman that were prohibited by the agreement or relationship of the parties. Certainly, there is more than reasonable support to justify the Lower Court's failure to specifically address a breach of loyalty claim and to support its finding that Fredman did not breach the contract.

It is further submitted that EPS' argument for forfeiture under the facts of this case is tantamount to an admission that the sum converted was not $105,352.50. A forfeiture of something to which one is otherwise rightfully entitled does not establish conversion. In order to sustain its claim for conversion, EPS had to prove that it had a proprietary right in the property converted at the time of the conversion and not merely a claim for damages upon some other theory or cause of action pled

[<u>Oxford Finance Companies, Inc. v. Burgess</u>, 303 S.C. 534, 402 S.E.2d 480 (Sup. Ct. 1991)]; therefore, anything more than 15% of the <u>total commissions earned for the quarter</u> could not have been converted because at the time of the alleged conversion EPS had no proprietary right in any other portion of the fees earned.

The cases cited by EPS concerning forfeiture also clearly hold that the forfeiture of money due to an employee is not automatic upon a finding of breach of duty and the Court is not required to order a forfeiture of any portion of employee's pay. The Court may in its discretion deny him all compensation or allow him reduced compensation or allow him full compensation as the Court determines. Forfeiture is clearly a question of fact to be determined by the Court based upon the relation of employer and employee, the nature and severity of the breach, and the damages suffered by the employer. **[<u>Hartford Elevator, Inc. v. Lauer</u>, 94 Wis.2d 571, 289 N.W.2d 280 (1980)]** Again, however, Fredman was an independent contractor, not an employee, and, as such, did not owe a duty of loyalty to EPS, the cause was not pled and the Court obviously did not find any facts which it felt warranted consideration of a forfeiture.

ARGUMENT B.

In response to EPS' second issue raised, it is submitted that the way the issue is stated is quite puzzling. Accounting and setoff have nothing at all to do with the 85/15% fee split determination. The burden was on Plaintiff, EPS, to prove that it had a proprietary right in and to the amount of money allegedly converted at the time of the conversion. **[Oxford Finance Companies, Inc. v. Burgess, 303 S.C. 534, 402 S.E.2d 480 (Sup. Ct. 1991)]** This it failed to do. The evidence unequivocally proves that EPS was only entitled to 15% of fees or commissions earned during the first quarter of 2010. Eighty five (85%) percent of the total always belonged to and was property of Fredman per his agreement with EPS (Dameron) before and at the time of remittance by Schwab. EPS never had a claim to that portion of the funds or a legal right to withhold them from Fredman or use them for its benefit in any way. Per the agreement, EPS was to receive them and immediately remit 85% to Fredman. All Fredman did was flip the distribution function from EPS to himself which he carried out punctually and within a reasonable time frame as EPS would have been required to do had it received the funds from Schwab. It is conceded that EPS' potential use of $7,674.11 was delayed for a very brief period of time from 04/09/2010 until on or about 04/20/2010 but, once that money was paid to EPS, it had the use of all money to which it was entitled under the fee split agreement from inception in 2008 through 03/31/2010 and any conversion which may have occurred was ended; therefore, the only damage that EPS could conceivably have sustained would be the loss of use of the

$7,674.11 for ten (10) or eleven (11) days (from the date Fredman received it on 04/09/2010 until he remitted it to Dameron on 04/20/2010) at the pre-judgment interest rate. There is absolutely no other evidence whatsoever that EPS incurred any other damages by this ten (10) or eleven (11) day loss of use.

Under the facts of this case, the evidence of EPS' receipt of all monies due to it per the agreement, as shown on Plaintiff's Exhibit #5 and clearly established by the testimony of Dameron and Fredman, is not a setoff but is merely impeachment of EPS' claim for conversion. It refutes EPS' claim of its proprietary right in and to the entire $105,352.50 and in and to any money allegedly converted, shows the length of time that the conversion existed and the damages, if any, that may have been incurred. In essence, it pertains to the proof or lack of proof of EPS' claim and is evidence in mitigation of damages under the agreement pled by EPS.

EPS' claim (re: conversion) is based upon its agreement with Fredman and the money it was due pursuant to that agreement from the inception of the agreement in 2008 through 03/31/2010. There was one (1) agreement to split fees and, although the split percentages were adjusted from time to time to accommodate and compensate EPS and Fredman in accordance with shifting duties and responsibilities of the parties, the claim for conversion is clearly based upon monies due to each of the parties pursuant to one (1) contract from start to finish. The burden was upon EPS to prove its proprietary right to funds pursuant to that agreement and that Fredman received and converted funds which belonged to it. EPS also had the burden of proving the duration of the conversion which may

have occurred and an ethical and legal duty to inform the Court of the amount and date that any monies were remitted to it by Fredman.

Setoff arises in situations such as when A has more than one transaction with B, the transactions are not related, and A sues B on one (1) transaction and B claims that the monies owed to him on an unrelated transaction should be offset against A's claim. One of the more typical setoff claims, for example, is when a person has money on deposit with a bank pursuant to a deposit contract or agreement pertaining to the deposit account but is also indebted to the bank pursuant to a note and mortgage on real estate which is an entirely separate transaction or agreement, and the creditor bank or debtor for some reason is wanting to apply the funds on deposit to the mortgage indebtedness to recover money owed on the mortgage or to avoid a delinquency or a foreclosure, whichever the case may be. In that instance, the parties to both transactions are the same but the resolution of the issues requires a determination of the rights and obligations of the parties pursuant to two (2) separate unrelated agreements, not simply one (1). This is not the case here. There is but one (1) transaction or agreement between the parties upon which EPS rests its claim.

Notwithstanding that this is not a setoff situation, ***SCRCP, Rule 8(c),*** does not list setoff as an affirmative defense that must be pled. The case of **<u>Broome v. Watts</u>, 319 S.C. 337, 461 S.E.2d 46 (Ct. App. 1995)** also holds that a pleading of setoff is not mandatory. Here the evidence was relevant as to a singular agreement pled by EPS as a basis for its claims and the amount of money converted by

Fredman. Accordingly, the issue of conversion and/or whether EPS had a proprietary claim to any monies in Fredman's possession pursuant to the agreement was squarely before the Court. The evidence, therefore, was admissible upon the issues submitted by EPS to the Court for determination and it was incumbent upon the Court to render its verdict in accordance with the evidence. In that regard the evidence clearly established that EPS (Dameron) received the $7,674.11 from Fredman in April 2010 and that goes directly to damages that may be assessed in the conversion claim and/or in computing any pre-judgment interest for loss of use of any money converted. The complaint was filed three (3) years after the money was allegedly converted and EPS knew that it had in its possession all money from the relationship with Fredman in which it had a proprietary interest. This is clearly established by EPS' own records and testimony of its own witnesses. It admitted that Fredman had returned to EPS $7,674.11 on or before 04/20/2010 and that he had accounted to it for all money belonging to EPS which he received from Schwab. In essence, EPS asserted a false claim for conversion of money, to-wit: $105,352.50, when it knew, or should have known, it had no valid claim to the money, at least, not $105,352.50 as claimed and not $15,802.87 as the Trial Judge found and as addressed in Appellants/Respondents' Brief on its appeal. The sum of $3,485.00, 85% of which or $2,962.25 that belonged to Fredman, was clearly sent directly to EPS by Schwab **[R., p.143, l.21 - p.145, l.21; p.172, ll.20-22; p.191, ll.8-25; Pl. Exh. #5: R.,p.440]**, so Fredman never ever possessed $15,802.87 that the Lower Court found was converted. Also, within days of receiving the money

from Schwab, Fredman paid over to EPS $7,674.11. **[R.,p. 69, ll.12-14; p.70, ll.7-8; p.110, ll.21-23; p.111, ll.3-14; Dameron 30(b)(6) Depo. (Def. Exh. #4): R., p.370, l.18 - p.382, l.10]** Fredman also forgave the indebtedness of EPS for monies owed to him from the prior quarter in the amount of $6,345.68, thereby accounting for all of the funds to which EPS had a proprietary right pursuant to the agreement of the parties. **[Pl. Exh. #5: R.,p.440]** Under the facts of this case, the evidence clearly shows where the money was at all times and was certainly relevant to any legitimate claims of EPS for conversion.

ARGUMENT C.

Plaintiff, EPS', third argument challenges the Lower Court's reduction of punitive damages from $35,000.00 to $20,000.00 upon reconsideration of the punitive damages issue pursuant to Fredman's ***SCRCP, Rule 59***, Post-Trial Motion.

In response to that argument, Appellants/Respondents, Fredman and Clemson-EPS Advisors, LLC, simply submit that the case does not warrant any award of punitive damages at all and the Trial Judge abused his discretion in awarding them in any amount. This issue is fully discussed in Pages 23-28 of Appellants/Respondents' Brief and Appellants/Respondents do not believe any further in depth discussion of the facts would be helpful or any more persuasive to the Court than what has already been expressed. Appellants/Respondents, Fredman and Clemson-EPS Advisors, LLC, do, however, wish to make a few additional comments in regards to the imposition of punitive damages.

Although the general rule is that punitive damages are largely within the discretion of the Court, that discretion is not without limitations. **State Farm Mutual Ins. Co. v. Campbell, 538 U.S. 408, 123 Sup. Ct. 1513, 155 L.Ed.2d 585 (2003),** holds that while state courts possess discretion over the imposition of punitive damages, there are procedural and substantive constitutional limitations on those awards. The due process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tort feasor and further prohibits states from punishing a defendant for conduct which is lawful in the jurisdiction where it occurred. Based upon these constitutional limitations and the holding of the Court in this case that Fredman had a right to do what he did, it is submitted that punitive damages in any amount are not justified and certainly that $20,000.00 is grossly excessive and arbitrary.

Clearly, the Lower Court in determining damages, both actual and punitive, was moved solely by the fact that EPS did not receive the check from Schwab that was supposed to have gone to it in the amount of $105,352.50.**[Motion Hrg: R.,p.207, ll.22-24]** It completely ignored and gave absolutely no consideration whatsoever to the fact that the total fees to be split by the parties for the first quarter of 2010 was $108,837.50, not $105,352.50 and that a portion of those fees were sent directly to EPS in the amount of $3,485.00 of which $2,962.65 belonged to Fredman. It also completely disregarded the fact that Fredman was still owed $6,345.00 for his share of fees dues from the last quarter of 2009 **[Def. Exh. #5: R.,p.440]** and that within eleven (11) or so days of receiving the $105,352.50 from

Schwab Fredman paid $7,674.11 to Dameron thereby restoring unto EPS the full value of its 15% of the commissions earned for the quarter. Instead, the Court merely determined that EPS had been deprived of $15,802.87 ($105,352.50 x 15%) and added interest on that sum at the rate of 8 3/4%, per annum, from 04/09/2010 through date of trial, a period of more than six (6) years, and determined the total of the actual damages incurred. It then based its award of punitive damages upon that erroneous amount. The Court's decision, in essence, held that once a conversion occurs in some amount it can never be cured or mitigated by return of the property converted. Clearly, the Court's award of punitive damages based on a finding of actual damages that is not supported by either the facts or the law cannot provide a legitimate basis for a consideration of punitive damages. Unless and until actual damages are correctly determined there is absolutely no way that anyone can begin to determine whether an award of punitive damages is grossly excessive or arbitrary punishment in contravention of the due process clause of the United States Constitution. It is, therefore, submitted that an award of punitive damages in any amount cannot stand and the award of $20,000.00 cannot be sustained.

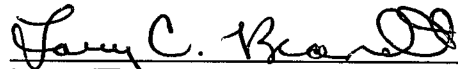
SUMMARY

Based upon the above, it is respectfully submitted that breach of loyalty was not preserved for consideration on appeal but, even assuming for the sake of argument that it was, the record fully supports the Lower Court's failure to specifically address the breach of loyalty claim and to support its finding that Fredman did not breach the contract.

Accounting and setoff is not only inapplicable to this situation but it is not an affirmative defense which must be pled pursuant to ***SCRCP, Rule 8(c)*** and the case of **Broome v. Watts**, **supra;** therefore, Fredman's failure to plead accounting and setoff does not prohibit the admission and consideration of the evidence presented, all of which was/is relevant and vital to a fair and correct determination of the issues.

As for the finding of punitive damages in any amount, it cannot be sustained due to the Trial Judge's failure to determine the underlying liability for actual damages upon correct findings of fact and application of the law of conversion. Accordingly, punitive damages in any amount, particularly in the amount of $20,000.00, cannot be sustained.

Respectfully submitted,



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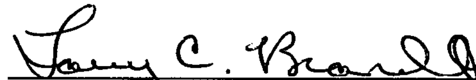
CERTIFICATE OF COUNSEL
(Appellants/Respondents' Final Brief to Cross Appeal)

The undersigned certifies that ***APPELLANTS/RESPONDENTS' FINAL BRIEF TO CROSS APPEAL*** complies with Rule 211(b), SCACR.



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PROOF OF SERVICE
(APPELLANTS/RESPONDENTS' FINAL BRIEF TO CROSS APPEAL)

I certify that I have served ***APPELLANTS/RESPONDENTS' FINAL BRIEF TO CROSS APPEAL*** upon the ***Respondent/Appellant, by and through its attorneys of record,*** by depositing a copy of it in the United States Mail, postage prepaid, on ***June 18th, 2018,*** addressed as follows:

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